Titan Wheel Corporation of Illinois *and* United Steelworkers of America, AFL–CIO–CLC. Case 14–CA–25610 (1–2)

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On July 31, 2000, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Titan Wheel Corporation of Illinois, Quincy, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Christal J. Cuin, Esq., for the General Counsel.
Douglas G. Olson, Esq., of Silvis, Illinois, for the Respondent.
David R. Jury, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in St. Louis, Missouri, on April 6, 2000. On June 14, 1999,[1] United Steelworkers of America, AFL–CIO–CLC (the Union), filed the charges in Case 14–CA–25610 (1–2) alleging that Titan Wheel Corporation of Illinois (the Respondent) had violated the Act by certain conduct. On August 31, 2000, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by videotaping and photographing employees who were engaged in handbilling at the Respondent's gates and by discriminatorily instructing an employee that he could not talk about the Union during worktime. The Respondent thereafter duly filed an answer to the complaint admitting that this matter was properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[2] and upon my observations of the demeanor of the witnesses, and after consideration of the briefs that have been filed by all parties, I make the following findings of fact and conclusions of law.

I. JURISDICTION

As it admits, the Respondent is a corporation that is located in Quincy, Illinois, where it manufactures wheels for off-road vehicles. During the year ending June 30, in the conduct of said business operations, the Respondent sold and shipped from its Quincy facility goods valued in excess of $50,000 directly to purchasers located at points outside Illinois. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Contentions

The Respondent employs about 700 production and maintenance employees, mostly on two shifts. None of those employees is represented by a labor organization. The Respondent is a subsidiary of Titan International Corporation. Another subsidiary of Titan International is Titan Tire Corporation of Des Moines, Iowa. Maurice Taylor is the chief executive officer of Titan International. Cheri Marlene Taylor Holley is the vice president and general counsel of Titan International (and she is the sister of Maurice Taylor). Ronald Shields is the Respondent's plant manager. Reporting to Shields are various supervisors including Brad Zelle, the Respondent's industrial relations manager, and Jerry Holley, the Respondent's area manager (and husband of Cheri Holley). Mike Irvine, a press department supervisor, reports directly to Jerry Holley.

The Respondent's Quincy plant is a complex that covers about six large, contiguous blocks. The Respondent purchased the plant from Firestone in 1986; at the time, Firestone had in place surveillance video cameras that were located on buildings or tall poles at various outdoor points throughout the complex, including points near nine gates to the property. The Respondent has continued to maintain and use the video cameras which feed to monitors that are located in a central guard shack. The Respondent employs Pinkerton guards to operate the video cameras; the Respondent admits that such guards are its agents within Section 2(13) of the Act.

On the northside of the complex, the Respondent has a large parking lot that drivers can access only from Katherine Road, a road that runs east-west in Quincy. The Katherine Road parking lot has two gates, numbers 13 and 14, with gate 13 being about 200 feet to the west of gate 14. (Accordingly, at the hearing gate 13 was referred to as the "west gate" and gate 14 was re-

[1] No exceptions were filed to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by discriminatorily instructing an employee that he could not talk about the Union during work time; or on June 2, 1999, by Industrial Relations Manager Bradley Zelle, photographing employees at the Respondent's facility who were present to engage in lawful handbilling of its employees.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] Unless otherwise indicated, all dates are in 1999.

[2] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered.

ferred to as the "east gate," even though both gates are on the north side of the Respondent's property.) A video camera is on a pole that is on the east side of the Katherine Road parking lot, about 75 to 100 feet south of Katherine Road (the Katherine Road video camera); it is undisputed that the Katherine Road video camera is usually pointed west toward the automobiles in the parking lot. There is a satellite guard shack at the Katherine Road parking lot which is always staffed at shift changes.

The production and maintenance employees of Titan Tire in Des Moines are represented by the Union; in May 1998, certain Titan Tire employees began a strike. From October 1998, through the week of the hearing, union organizers and some strikers from Titan Tire distributed organizational handbills at the Respondent's plant, usually 1 or 2 days per week. The complaint, at paragraph 5(a), alleges that, in violation of Section 8(a)(1) of the Act: "Since about December 15, 1998, Respondent, by the Pinkerton guards, has been videotaping, without proper justification, the Union's distribution of handbills to employees on Wednesday and Thursday afternoons at the Katherine Road gates of Respondent's facility." The General Counsel contends that, although the video camera that is positioned at the Katherine Road parking lot usually scans the parked automobiles continuously, when the Union is handbilling, the Respondent turns that camera from the automobiles and trains it only on the handbilling activity. The Respondent admits that it has caused the camera to be pointed at the Katherine Road gates when the handbilling is being conducted there, but it claims that it does so as a matter of business necessity.[3]

The complaint, at paragraph 5(c), further alleges that, in violation of Section 8(a)(1): "On June 2, 1999, Respondent, by Industrial Relations Manager Zelle, without proper justification, photographed employees at Respondent's facility who were present to engage in lawful handbilling of Respondent's employees." The General Counsel offered evidence tending to show that the Respondent's agents took photographs of those who were handbilling on June 2, and the General Counsel contends that, even if the Respondent took no photographs of its employees,[4] its employees would have been coerced by witnessing the photographing activity. The Respondent admits that Zelle took photographs of professional union organizers and some Titan Tire employees who were handbilling, but it denies that it took any pictures of its employees or that its employees could have witnessed the photographing activity.

Finally, the complaint, at paragraph 5(b), alleges that, in violation of Section 8(a)(1):

> About March 11, 1999, in the office of Industrial Relations Manager Zelle at Respondent's facility, Respondent instructed an employee that talking about the Union was prohibited during working time, although employees are permitted to talk about other matters during working time, and Respondent threatened discipline if the employee discussed the Union during working time.

In support of this allegation the General Counsel presented testimony tending to show that Cheri Holley so instructed a press department employee and that the employees had theretofore been permitted to discuss nonwork-related topics while working. The Respondent contends that the only instruction that Holley gave to the employee was consistent with its published no-solicitation rule, the validity of which is not questioned by the complaint; alternatively, the Respondent contends that, even if the employee was told not to talk about the Union while working, employees in the press department are not permitted to engage in any nonwork discussions during their work time.

B. Facts

The General Counsel's Evidence—Videotaping and Photographing

Union organizer John Puskar testified that the Union has, from December 1998, until the date of the hearing, conducted organizational handbilling at as many as four of the Respondent's nine gates. Puskar testified that he personally engaged in such handbilling, with others, from December 1998 until December 1999, mostly at the Katherine Road gates and mostly at the 3 p.m. shift change. Puskar further testified that, from April through December, the Respondent closed the west gate of the Katherine Road parking lot when handbilling was being conducted there, an action that forced all traffic from Katherine Road to enter and exit only at the east gate. Puskar testified that on all days after March 31, that he handbilled, when he would first arrive at Katherine Road, the video camera would be pointed west in the direction of the parked automobiles. When he began handbilling, the video camera would swing to face almost due north and point in his direction at the east gate; it remained pointed in that direction until he (and the group with him) stopped the handbilling activity; then it would swing back to point west again toward the automobiles in the parking lot. Puskar testified to similar results when he (and other nonemployees) handbilled at four of the Respondent's other gates; that is, before and after handbilling was conducted at the gates, nearby video cameras would be pointed to automobiles in adjacent parking lots; during the handbilling, the cameras would turn and point to that activity. Puskar also testified that at many other times, when he was not engaging in handbilling activities, he drove by the Respondent's gates to parking lots; each time that he did so, the video cameras pointed only at the automobiles in the lots, not at the gates. This occurred even at shift changes when employees were entering and exiting the gates (and no handbilling activity was being conducted). None of this testimony was disputed by the Respondent's witnesses.

Mike Mathis, a striking Titan Tire employee, testified that he has participated in the weekly handbilling of the Respondent's

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[3] On brief, the Respondent further contends that this allegation is barred by the 6-month limitations period of Sec. 10(b) of the Act because one of the General Counsel's witnesses testified that the questioned videotaping began in October 1998. As the Respondent did not raise this affirmative defense in its answer, however, it is not privileged to assert it here. *Prestige Ford,* 320 NLRB 1172 at fn. 3 (1996). Moreover, the alleged violation is of a continuing nature, and the allegation is not defeated simply because the conduct in question began more than 6 months prior to the filing of the charge. *Mason & Hanger-Silas Mason Co.*, 167 NLRB 894 (1967), enfd. 405 F.2d 1 (5th Cir. 1968).

[4] The General Counsel does not contend that the striking Titan Tire employees who were handbilling on June 2 were also employees of the Respondent.

plant continuing from December 1998, until the week of the hearing. As well as corroborating Puskar's testimony about how the surveillance video cameras turned from the parking lots to the direction of the handbilling activity through December 1999, Mathis testified that the cameras have continued to do so thereafter. This testimony is also not disputed by the Respondent.

The General Counsel placed in evidence a copy of a March 31 memorandum from Zelle the Pinkerton guards. It states, inter alia: "When the Union reps are at the [Katherine Road] lot, a security officer is to close the west gate and watch the east gate. The camera is to be on the east gate and recording on a single screen [of the central guard shack's monitors]."

Puskar further testified that on June 2, he, Tom Wiliford, Larry Bulby, and Bob Jenkins handbilled at another of the Respondent's gates between 2:45 and 3:15 p.m., or 15 minutes either side of the afternoon shift change. Wiliford is also a professional union organizer; Bulby and Jenkins are striking Titan Tire employees. As the four men handbilled, they noticed two men inside the gate, one of whom was taking pictures of them with a telephoto-lens camera. Puskar testified that the two men stayed taking photographs for "[p]robably around 15 to 20 minutes," and, at the time, "[t]here were employees of Titan Wheel, moving in and out of the plant." Puskar left the area, walked a half-block to his car, retrieved a camera of his own, and returned to take photographs of the two men who were taking pictures of his group. Photographs that Puskar took show two men, one tall and one short, behind a 5-foot chain-link fence. The taller man has a camera with a telephoto lens, and he appears to be taking pictures from over the top of the fence. The Respondent admits that the man who is holding a camera is one Barry Oberling (otherwise unidentified), that the man with Oberling is Industrial Relations Manager Zelle, and that Zelle directed Oberling to take pictures of the union representatives on June 2. The Respondent denies, however, that there were any employees present in the area. No copies of Oberling's photographs were placed in evidence. (None of the photographs that were taken by Puskar show any employees; however, Puskar explained on cross-examination that he was not there to take pictures of employees.)

The General Counsel's Evidence—Instructions to an Employee

Albert Finney has been employed by the Respondent for about 3-½ years as a press operator under first-shift department supervisor Mike Irvine. Finney testified that first-shift employees receive a morning break from 9 to 9:15; the beginnings and endings of breaks are marked by bells that sound throughout the plant. On March 9, further according to Finney, after the break-ending bell had already sounded, he was in an aisle, returning to his work area from a breakroom, when he met fellow employee Edward Stanbaugh who was coming out of Irvine's office. Finney asked Stanbaugh "if he was interested in the Union" and if he would give him (Finney) his (Stanbaugh's) telephone number and address so that he (Finney) could give it to the Union. Stanbaugh replied that he would "have to think about it." Finney then went on to work at his press. That day, Finney was operating a 3000-ton press with only one other employee, but sometimes the operation requires as many as five employees at a time.

Finney further testified that on March 11, at quitting time, Irvine told him to go to Zelle's office. There he met Zelle and Jerry Holley. Zelle told Finney to sit down and relax because he was "not being fired." Jerry Holley and Zelle talked circumspectly with Finney until two women entered the room, attorney Cheri Holley and Cheryl Luthin, Cheri Holley's secretary. Cheri Holley told Finney that Luthin was going to take notes of what she had to say to him. On direct examination, Finney was asked and he testified:

> Q. Okay, then what did Ms. Holley say?
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> A. Well, she said that she heard I was getting names and numbers for the Union, and that it wasn't allowed to get names and numbers for the Union during work hours. . . . She said it was all right before or after work, or during breaks. And, if I continued to do it, I would be disciplined for it, during work hours.
>
> Q. Did the issue of employees talking to you come up?
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> A. Yes, it did. She said that if anybody come to me to talk about the Union, to have them come back during breaks or before or after work, and they could talk to me about it then.
>
> Q. Okay. During this meeting, did the issue of discipline come up?
>
> A. Yes.
>
> Q. What did Ms. Holley say?
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> A. Well, [Holley said] that if I continued to do that—to talk about the Union, you know, during work hours, that I would be disciplined for that.

Finney testified that previously employees had been allowed to freely talk about any subject while working. As an illustration, Finney testified that previously, while in the press-operations area, while operations were on-going, he and Irvine regularly discussed television productions of professional wrestling matches; this usually occurred on Mondays and Tuesdays after Sunday and Monday productions. Finney further testified that press operators are regularly required to wait during certain cycles of the operation; during those times employees have been free to engage in any discussions that they wish. Finney further testified that, specifically on June 23 (the day before he gave an affidavit in this case):

> . . . Mike Williams come up to the machine, and he is into church pretty much regular, and he come up and asked us about going to his church picnic. And . . . Mike Irvine come up, and I asked him if he was going to go to the church picnic, and Mike [Irvine] says, "What picnic?" I said, "Mike Williams' church picnic." And, Mike [Irvine] says, "Is this one of them where they lay hands on each other," and he [Irvine] laid his hands on Mike [Williams], and kind of like stuttered back, like he was going to pass out.

Finney testified that Irvine did not discipline him either for mentioning the church picnic to him during worktime or for having participated in the preceding nonwork-related discussion with Williams.

The General Counsel subpoenaed from the Respondent all records of warning notices or other discipline of employees for "engaging in solicitation or talking" from January 1, 1998, to the date of hearing. The Respondent produced no warnings about solicitations (but the General Counsel offered no evidence that employees ever conducted solicitations in contravention to the Respondent's no-solicitation rule). The Respondent also produced no warning notices that had been issued for talking; the Respondent produced only warning notices that were issued for employees' being out of their work areas or other loafing-type disciplinary offenses (such as sleeping on the job). The General Counsel also subpoenaed copies of any written rule that the Respondent may have against "solicitation or talking." The Respondent produced a copy of its (nonviolative) no-solicitation rule, but it produced no evidence of a written rule against talking during worktime.

The Respondent's Evidence—Videotaping and Photographing

As quoted above, Zelle's March 31 directive to the Pinkerton guards orders them, during periods of the union's handbilling, to close the west gate on Katherine Road and to keep a video camera trained on the east gate. Zelle agreed that, other than what is required by that directive, the camera "usually watch[es] the parking lot."

Zelle testified that traffic backups on Katherine Road are especially a peril because the entrances to the parking lots are located below the crest of a hill. Zelle further testified that he had received written complaints from employees who stated that handbilling individuals had stood in front of their cars, causing them to stop partly in the road before they could get through the gate. (Received in evidence were two such reports from employees; both refer to incidents that occurred on November 12, 1998; neither refers to Katherine Road traffic actually backing up. On cross-examination Puskar admitted that there is somewhat of a rise in Katherine Road to the west of the west gate, but Puskar denied that any handbilling that he did ever stopped traffic on Katherine Road.) According to Zelle, and attorney Cheri Holley, some unnamed individual in the local sheriff's office[5] told them that the sheriff would not come to the scene unless there was, in fact, an accident; that individual also suggested closing of the west gate and requiring all Katherine Road traffic to enter the east gate, during the handbilling periods, to given traffic approaching from the west 200 more feet of stopping space. Holley testified that a deputy also told her to train the Katherine Road video camera on the east gate, "so we could view traffic congestion." On brief, the Respondent contends that these instructions by the sheriff's office are the reason that, during handbilling, it closed the west gate on Katherine Road and began training the Katherine Road video camera on the east gate. Zelle testified that none of the tapes of the handbilling existed at time of trial because tapes are routinely taped over when nothing "significant" is recorded on them.

Zelle testified that on June 2, he instructed Oberling to take (still) photographs of Puskar and the other individuals who were handbilling in order to prevent possible violence at a Company picnic that was scheduled for June 19. Zelle testified that he had heard rumors that persons acting on behalf of the Union were going to crash the picnic and offer free beer to anyone who would take it. Zelle testified that he feared that the free beer, and conflicting union sentiments, would cause fights. (There was going to be beer at the picnic anyway, but only what the employees themselves would bring.) Zelle testified that he wanted pictures of those nonemployees who engaged in the handbilling in order to enable security personnel to identify them if they attempted to crash the picnic. Zelle testified that he was careful that there were no employees in the area while Oberling was taking pictures. Zelle was not asked how long it was that he and Oberling were in the vicinity of the gate taking pictures. The Respondent did not offer any of the photographs that Oberling took.

The Respondent's Evidence—Instructions to an Employee

Stanbaugh agreed that his March 9 encounter with Finney happened in an aisle, but he denied that both he and Finney were ending a break period at the time. Stanbaugh testified that Finney had already returned to work at the 3000-ton press, and had started working, before the encounter occurred. Stanbaugh testified that, as he walked in the aisle on the way to his own workstation, Finney punched a button that started a 1-minute cycle of the press; then Finney stepped into the aisle to address him. Finney asked Stanbaugh only if he wanted to join the Union. (That is, Stanbaugh did not testify that Finney asked him for his address and telephone number, as Finney testified.) Stanbaugh testified that he told Finney, "No, I wouldn't" and walked on; Finney then returned to the press operation.

Stanbaugh further testified that after the exchange with Finney he went to Irvine's office where he met his supervisor, Rich Cook, and Irvine. Stanbaugh told Cook and Irvine that Finney had solicited him to join the Union. On cross-examination, Stanbaugh was asked why he reported the exchange with Finney to supervision; Stanbaugh replied: "Well, because it is harassing people that doesn't want to join the Union, and it is wasting Company time."

Irvine, who has supervised about 40 employees in the press department since 1989, testified that Stanbaugh told him that Finney had interrupted him when he was on his way to his workstation, "recruiting him for the Union, or getting information from him for the Union, or something like that." Irvine reported the incident to his supervisor, Jerry Holley. Irvine was asked and he testified:

> Q. Do you allow your employees to talk during work time?
>
> A. No. They are instructed—they have to concentrate on their jobs. Their jobs are dangerous work, and they can't be distracted. Any matter could lead to injury.

Irvine testified that several employees have been injured operating the presses, including Finney, and that one employee lost a finger when performing the press operations. Irvine further testified that he has talked to his employees about wrestling and other nonwork-related topics, but only during break times. Irvine was further asked and he testified:

[5] The Respondent's plant is located in the county, outside the city of Quincy.

> Q. Did you ever have a conversation with Mr. Williams, wherein he was talking about religious matters?
>
> A. Not during working hours.

Irvine was not asked if he ever had a worktime, workarea, conversation with Finney about Williams' church picnic. On cross-examination, Irvine acknowledged that Stanbaugh's report about Finney's March 9 conduct was the only such incident that he has ever reported to upper management; Irvine testified that he reported the incident because Stanbaugh had complained that "he had been stopped from doing his job." When asked if he had ever issued a warning notice to any of his 40 employees for talking during worktime, Irvine first testified that, "I don't believe I have." Then Irvine testified, "I probably have." (As noted, although subpoenaed, the Respondent could produce no warning notices that Irvine, or any other supervisor, has issued for talking during worktime.)

Attorney Cheri Holley, the agent of the Respondent who is alleged to have told Finney that he should not engage in any conversations about the Union during work time, testified that:

> I introduced myself and Cheryl [Luthin], and I explained to him that this was not a disciplinary hearing. That I wanted to make sure he understood our solicitation policy, and that he understood that he was to—that it was in the handbook, and that the job that he performed on the press, that there was a lot of issues in regards to safety, and that he should not be talking to people while he was supposed to be working. But, that he could—after I explained the solicitation policy, I said you can solicit in the break rooms on your break, you can solicit at lunch time, any other time, but not during working hours.

Zelle corroborated Holley's version of her instruction to Finney.

C. Credibility Resolutions and Conclusions

Videotaping and Photographing

The Board has long held that, absent proper justification, the photographing of employees engaged in union or protected concerted activities violates the Act because it has a tendency to intimidate them. *Waco, Inc.*, 273 NLRB 746, 747 (1984). More specifically, in *Frontier Hotel & Casino*, 323 NLRB 815 (1997), the Board found that an employer's turning of parking-lot video cameras to watch handbilling, without justification, constituted unlawful surveillance. The Respondent admits that the Katherine Road video camera is usually trained on the automobiles that are in that lot, and it further admits that, since March 31, during the periods of the union's handbilling activity at that parking lot, it has turned that camera directly toward that activity. The Respondent contends, however, that it has had a justification for this practice. The Respondent's witnesses Zelle and Cheri Holley testified that they have been concerned about potential traffic backups, and collisions, on Katherine Road during the periods of handbilling and that, when they expressed that concern to some person (or persons) from the sheriff's office, that person (or those persons) instructed the Respondent that, during the periods of handbilling, it should close the west gate on Katherine Road, thereby forcing all employee traffic from that road to come through the east gate, and to videotape the goings-on at the east gate. However, I simply do not believe that testimony. The testimony of what some sheriff's department representative told the Respondent is unsupported by the testimony of any such representative. The Respondent's defense of justification is also unsupported by any testimony that backups on Katherine Road were ever caused by, or even occurred during, the handbilling activity. Zelle testified that none of the videotapes were saved because nothing "significant" ever appeared on them; if any backups had occurred, videotapes of them would assuredly have been "significant" to the Respondent's position in this matter.[6] Additionally, the Respondent requires guards to make reports of any "significant" incidents; even though a guard has always been stationed at the Katherine Road parking lot during shift changes, the Respondent offered no report of traffic problems that were caused by the handbilling, either before or after March 31.[7] Nor did the Respondent offer any reason why the Katherine Road guard could not cause the video camera to turn toward the gate only when there was something "significant" (like congestion) occurring there. Nor did the Respondent present any guard to testify that he or she had ever had to ask those who were handbilling to stop blocking traffic. Finally, the Respondent trains video cameras on handbilling at gates throughout the Respondent's complex, not just on the handbilling on Katherine Road. Certainly, the Respondent does not contend that feared traffic congestion at any other point in the complex is the reason that all of the video-camera surveillance is being conducted. In summary, I find that the Respondent has presented no credible evidence of a justification for its videotape surveillance of the union's handbilling of the employees. Accordingly, I conclude that by conducting that surveillance it violated Section 8(a)(1).

The General Counsel also cites *Waco, Inc.*, and its progeny, for the proposition that the Respondent's photographing of those who were handbilling at another gate on June 2 violated Section 8(a)(1). The General Counsel argues on brief:

> Respondent may contend its failure to photograph employees mitigates (sic) against the coercive nature of the photographs. However, employees who were walking into and out of the facility would have had no way of knowing who Oberling was and was not photographing with the large telephoto lens. The evidence merely establishes that while employees entered and exited the plant, Oberling stood near an entrance with a camera and a large telephoto lens and, at Zelle's direction, took pictures of persons distributing literature to Respondent's employees.

This, of course, is a concession that Oberling took no pictures of employees,[8] even though paragraph 5(c) of the complaint

[6] On the other hand, the Respondent's videotaping of the handbilling necessarily precluded the videotaping of any simultaneous "significant" incidents, such as collisions, thefts, fights or vandalism (all of which are greater perils at shift changes).

[7] The employee memoranda of November 12, 1998, were remote, and they did not mention any actual traffic problems on Katherine Road.

[8] Again, no copies of Oberling's photographs were placed in evidence.

alleges that the Respondent violated Section 8(a)(1) because it "photographed employees at Respondent's facility who were present to engage in lawful handbilling . . . ." It is also the advancement of a theory of violation that is not alleged in the complaint, impression of surveillance. I do credit Puskar's testimony that there were employees in the area,[9] but even if the violation of impression of surveillance had been alleged, there is no support for the General Counsel's argument that those employees would have thought that Oberling was photographing them. Puskar did not testify that employees were ever close enough to the handbilling to be in front of Oberling's camera. Moreover, people can see photographs being taken of other people without forming the impression that photographs are being taken of themselves. Finally, the General Counsel cites no authority for the proposition that an employer coerces its employees when they see its agents taking photographs only of nonemployees. Accordingly, I shall recommend dismissal of paragraph 5(c) of the complaint.

Instructions to an Employee

Whether Finney and Stanbaugh were on worktime during their exchange of March 9 is not a factual issue in this case. Finney admitted that the break-ending bell had already rung when, in a work area,[10] he solicited Stanbaugh for the Union. The bell having rung, Finney and Stanbaugh were on worktime.[11] The factual issues are whether, on March 11, Cheri Holley instructed Finney not to engage even in mere discussions about (as opposed to solicitations for) the Union during worktimes and whether the Respondent had theretofore allowed, or did thereafter allow, employee discussions of nonwork-related matters during worktime. If Holley did so, and if the Respondent allowed other nonwork-related discussions by employees during worktime, the Respondent's conduct is discriminatory and unlawful.[12]

Irvine admitted that there are pauses during press operations that would allow employees opportunities to talk between and among themselves. And as many as five employees at a time work on a press. Nevertheless, Irvine testified that he did not permit employee conversations during such pauses unless the conversations dealt strictly with work issues. This is too much to believe, and I do not. It is too much against human nature for people not to freely talk when they are in physical proximity, have much in common, and have nothing else to do. Any supervisor who actually tried to prevent all instances of such worktime talking would have time to do little else. As well, after Irvine was led to generally deny that he allowed employees "to talk during work time," he went on to say: "They are instructed—they have to concentrate on their jobs. Their jobs are dangerous work, and they can't be distracted. Any matter could lead to injury." That is, Irvine cut himself off from testifying that employees "are instructed" not to talk about nonwork-related matters during worktime, and I do not believe that they ever were. Stanbaugh, who expressed great familiarity with the press operations, and who was obviously in sympathy with the Respondent's position in this case, certainly did not testify that employees in the pressroom were not allowed to talk about nonwork-related matters during worktime. (Even Zelle, the Respondent's industrial relations manager, did not testify to the existence of any rule against talking during worktime.) Moreover, although subpoenaed, the Respondent produced no evidence of a written rule that employees are not allowed to discuss nonwork topics even when they have a pause in their work, and there is no evidence that Irvine (or any other supervisor) has issued a warning notice to any employee because he or she had been talking about a nonwork topic during worktime. Indeed, there is no evidence that Irvine (or any other supervisor) ever orally warned employees of discipline because they had talked about nonwork-related matters during worktime. That is, it appears that, at most, Irvine would instruct employees to "get to work" if he found them engaging in talking that interfered with their work, but there is no evidence that Irvine would warn employees that, even if there was no interference with work, they would suffer some sort of discipline if they were ever caught talking about nonwork matters during worktime. Also, Irvine's concern for safety as the basis for a no-nonwork-related-talking rule simply did not ring true; employees can be injured when talking about work-related matters just as easily as they can be injured when talking about nonwork-related matters. Finally on this point, although Irvine denied discussing Williams' church picnic *with Williams* during worktime (something of which he was not accused), he did not deny discussing the church picnic with Finney on worktime (and mocking Williams' religious practices and mimicking a person's fainting in that area of "dangerous work"). That is, I credit Finney's testimony that, before March 11, and thereafter, employees were allowed to talk about nonwork-related topics (such as wrestling) during worktime. (Of course, employees presumably were not allowed to engage in discussions about nonwork-related topics if such discussions were a part of activity that interfered with their work. The issue is not, however, whether Respondent imposed upon Finney a prohibition against discussions that interfered with work; again, the issue is whether Respondent imposed upon Finney a prohibition against discussion of one nonwork-related topic, the Union, whether or not work would thereby be interfered with.)

Although Finney was believable in his testimony that employees were allowed to discuss nonwork topics during worktime, he was not believable in his testimony that Cheri Holley instructed him that he could not discuss the Union during worktime. On brief, while arguing that Holley did so instruct Finney, the General Counsel never quotes Finney's testimony. Scrutiny of Finney's direct examination reveals why. When first asked what Holley had told him, Finney confined his answer to Holley's prohibitions against worktime solicitations, not mere talking. Again, Finney replied:

[9] The Respondent offered no testimony in denial of Puskar's testimony that Zelle and Oberling were present, and taking photographs, for 20 minutes of the shift-change period. The strong likelihood that employees would use the gate during such a long period, of course, is why the Union representatives were handbilling there in the first place.

[10] All subsequent discussions of this issue assume employee discussions are in working areas.

[11] For purposes of review, I here state that I credit Finney's account of the exchange between him and Stanbaugh.

[12] *ITT Industries,* 331 NLRB No. 7 (2000).

> Well, she said that she heard I was getting names and numbers for the Union, and that it wasn't allowed to get names and numbers for the Union during work hours. . . . She said it was all right before or after work, or during breaks. And, if I continued to do it, I would be disciplined for it, during work hours.

By his second use of "it," Finney was obviously referring to what he had already testified to, Holley's reference to his worktime solicitation of getting names and telephone numbers for the Union. The General Counsel did not then ask Finney, in nonleading fashion, if Holley said anything else. Instead, the General Counsel asked Finney, "During this meeting, did the issue of discipline come up?" Of course, Finney had already testified that Holley had told him that he would be "disciplined" if he continued to get names and numbers for the Union during worktime. Finney obviously recognized this request for repetition as a signal to improve his testimony, and he did so, but only after starting his answer by repeating his answer that Holley had warned him against "continued" solicitations. That is, Finney answered the lead: "Well, [Holley] said that if I continued to do that—to talk about the Union, you know, during work hours, that I would be disciplined for that." This was less than impressive testimony, and it is not surprising that the General Counsel does not quote any of it on brief.

Further, the General Counsel argues on brief that: "Finney's testimony was consistent with notes taken by Cheri Holley's secretary. Thus, the notes, like Finney's testimony, reflect that Holley's warnings were specific about talking about a union during worktime." Just as the General Counsel's brief fails to quote any of Finney's testimony that Holley told him that he could not "talk" about the Union, the General Counsel does not quote any segment of Luthin's notes as support for the proposition that Holley "was specific about talking about a union during worktime." Moreover, although the complaint alleges that Finney was threatened with discipline on March 11, Luthin's notes (which the General Counsel introduced) plainly show that Holley's only references to "discipline" were to state three times that Finney was *not* being disciplined and that: "She told him that normally in situations when an employee is not doing his work they are generally disciplined." This last reference is plainly a warning against only activities that are in derogation of the employee's duty to work during worktime. Finally, the notes further state that: "Cheri told him, he as well as the other employees, have a right to belong [to], and be curious about, the union, but Titan does have a solicitation policy and it must be followed." This is entirely consistent with the testimonies of Holley and Zelle, and it is consistent with Finney's (unassisted) testimony that Holley reproached him only about the solicitation activity of getting "names and numbers for the Union during working hours." (And Finney acknowledged that Holley explained that her use of the term "working hours" included only worktime.)

For these reasons, I do not credit Finney's testimony that Holley instructed him not to talk about the Union during work time, and I do not credit Finney's testimony that Holley told him that he would be disciplined if he did discuss the Union during worktime. Accordingly, I shall recommend dismissal of paragraph 5(b) of the complaint.

(I further reject the General Counsel's attempt on brief to amend the complaint to allege that Holley unlawfully instructed Finney to inform on other employees' protected activities. From the notes and Zelle's testimony (but not Finney's testimony), it does appear that Holley told Finney that he should report worktime solicitations to supervision. In view of the existence of the Respondent's valid no-solicitation rule, and in view of the fact that there is no evidence that the Respondent permitted other solicitations during worktime, however, it must be concluded that the solicitations which Holley asked Finney to report would not have been protected activities.)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Titan Wheel Corporation of Illinois, of Quincy, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging, without lawful justification, in videotape surveillance of its employees' participation in handbilling or other activities on behalf of the Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Quincy, Illinois, facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1999, the date of the first unfair labor practice found herein.

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[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT, without lawful justification, engage in videotape surveillance of your participation in handbilling or other activities on behalf of United Steelworkers of America, AFL–CIO–CLC.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

TITAN WHEEL CORPORATION OF ILLINOIS